**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

WALT DISNEY WORLD CO.,
Respondent

and Case No. 12-CA-25889

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1625,
Charging Party

**RESPONDENT, WALT DISNEY WORLD CO.'S ANSWERING BRIEF TO GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

Respondent, Walt Disney World Co. ("Disney," the "Company," or the "Respondent"), submits its Answering Brief to the General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision and the General Counsel's Brief in Support of Cross Exceptions to the Decision of the Administrative Law Judge.

Dated: September 9, 2009

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## I.

## STATEMENT OF THE CASE

This case arises out of a decision by the Company to reorganize its catering operations in order to dramatically improve guest satisfaction levels and hence, revenues. After several months of analysis and test marketing, initiated as a result of years of declining guest service levels, Disney's Director of Catering and Convention Services, Ann Williams, presented to the Company, in October, 2007, a confidential proposal to reorganize the catering operations. Williams' proposal involved hiring an additional 24 first-line managers ("GSMs"), and eliminating the Captain, Bar Captain, and Bartender classifications. Employees belonging to the classifications that were proposed to be eliminated are represented by the Charging Party, the United Food and Commercial Workers Union, Local 1625 ("Local 1625" or the "Union").

The Union filed a grievance and an unfair labor practice charge. Region 12 issued a Complaint alleging that the Company violated the National Labor Relations Act (the "Act") by unilaterally implementing the reorganization plan. The Complaint was heard before Administrative Law Judge George Carson (the "ALJ") on April 1, 2, and 3, 2009. The parties timely submitted post-hearing briefs, and on June 2, 2009, the ALJ issued his Decision (the "Decision").[1] The ALJ found that the Company violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally implementing the reorganization and by failing to provide information to the Union.

The Company contends that the ALJ erred in reaching the Decision, and has filed Exceptions to it, along with a Brief in Support of the Exceptions. The General Counsel has filed

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[1] Citations to the record are formatted as follows [GC Exh. 1] refers to General Counsel Exhibit 1. The same format is used for exhibits from the Charging Party ("CP") and the Respondent ("Resp."). Citations to the transcript of the hearing before the ALJ are formatted as follows: [Trans. 1/2-4] refers to page 1, lines 2 through 4. Citations to the Decision are cited as follows: [Decision: 1/2-4] refers to page 1, lines 2 through 4. Citations to the General Counsel's Brief in Support of Cross Exceptions to the Decision of the Administrative Law Judge are formatted as follows: [GCB: 1] refers to page 1 of the General Counsel's Brief.

Cross-Exceptions and a Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge ("General Counsel's Brief"). This Brief addresses the relevant facts and issues discussed in the General Counsel's Brief.

## II.

## FACTUAL BACKGROUND

### A. Bargaining History And Relevant CBA[2] Language

Addendum A of the CBA contains job classifications for tipped and non-tipped employees, with their respective hourly wages. [Resp. Exh. 4]. The tipped employees in the catering operations are represented by Local 1625. [*Id.*]. Addendum B-5 of the CBA contains certain terms and conditions of employment covering the bargaining unit employees represented by Local 1625, including the gratuity distribution covering these employees. [*Id.*]. In addition, Addendum B-5 also includes a section entitled "Staffing Guidelines," which states, in relevant part, as follows:

> **ADDENDUM B-5 (from 2007-2010 CBA)**
>
> **Staffing Guidelines**
>
> **Management reserves the right to staff functions as deemed appropriate.** (emphasis supplied).

| | |
|---|---|
| Standard number of Bartenders | 1 per 100 Open Bar<br>1 per 100 Beer and Wine<br>1 per 200 cash bar with Cashier<br>(without Cashier 1 per 100 applies) |

[*Id.*].

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[2] "CBA" refers to the 2007-2010 Collective Bargaining Agreement, unless otherwise noted.

Under Addendum D-5 of the May 2, 2004 collective bargaining agreement (the "2004 CBA"), and specifically the subsection entitled, "Catering," there existed a subsection entitled, "Staffing Guidelines," which stated, in pertinent part, as follows:

**ADDENDUM D-5 (from 2004-2007 CBA)**

**Staffing Guidelines**

1. The current staffing ratios of Captains to covers in Resorts will be applied property-wide.

| | |
|---|---|
| ** Standard number of Covers per Server | Plated or Buffet*<br>Breakfast-25<br>Lunch-25<br>Dinner-20<br>Reception<br><500=50<br><500=75<br>Boxed Lunch - 75<br>Dessert - 50<br>*Buffets>500 - 35 |
| ** Standard number of Captains | 1 per 100 - 250<br>2 per 250-500<br>3 per 500-1000 |
| Standard number of Bartenders | 1 per 100 Open Bar<br>1 per 100 Beer and Wine<br>1 per 200 cash bar with Cashier<br>(without Cashier 1 per 100 applies) |
| Scheduling a back aisle position will be on a 1/500 guideline | |

Coffee break Captains will not be scheduled for single functions less than one hundred (100) guests. (This does not apply to multiple functions that are less than one hundred (100) guests.)

** The parties recognize that the numbers represent a guideline and may fluctuate from event to event.

[Resp. Exh. 3].

In the 2004 CBA's staffing matrix, the section on Captains, but not the section on Bartenders, contained a double asterisk corresponding to a note stating, "The parties recognize that the numbers represent a guideline and may fluctuate from event to event."[3] [*Id.*].

The foregoing language was the subject of lengthy discussions during the negotiation of the current CBA. [Trans. 464/15-466/25.]. As a result of these discussions, the parties deleted all numerical staffing guidelines for Bar Captains and Banquet Captains, and substantially bolstered Disney's unreviewable discretion to staff functions, as follows: "Management reserves the right to staff functions as it deems appropriate." [Resp. Exh. 4]. Immediately following this language is a matrix that includes only Bartenders, and duplicates the ratios listed in the Bartender section of the prior CBA's staffing matrix. [*Id.*].

**B. <u>Staffing Of Functions</u>**

For many years, staffing of catering functions, whether in Disney's theme parks or in its resorts, has been handled essentially in the same manner. [Trans. 114/24-115/13.]. The first line supervisor position is called a Banquet Guest Services Manager ("GSM"), and is a non-bargaining unit, managerial position. [Trans. 28/4-12, 325/25-326/7]. For nearly 40 years, it has been the responsibility of the GSMs to determine the staffing of functions as they have deemed appropriate to the size, complexity and demands of particular functions. [Trans. 115/10-13, 331/2-332/2, 334/4-25]. Once the GSM is assigned responsibility as a manager for a particular function, he or she determines how many of each type of employee will be required to staff that function. [Trans. 334/21-25].

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[3] Disney contends that the absence of a double asterisk next to the section on Bartenders was a mere typographical oversight, and the bargaining history corroborates this contention. [Trans. 463/16-464/14.]. In any event, the adoption of the current CBA solidified Disney's position that any and all staffing parameters, whether for Captains, Bar Captains, or Bartenders, are guidelines, not requirements, which Disney is free to follow, modify, or ignore, consistent with the generally understood meaning of the term "guideline." [Trans. 352/5-10, 465/5-9].

Until on or about June 29, 2008, Banquet Captains were assigned responsibilities by GSMs in both the theme park and resort catering operations. [Trans. 26/11-16]. In the theme parks, however, Bartenders and Bar Captains have not existed as classifications for many years, and the Bartender responsibilities have been handled, where required, by Servers. [Trans. 44/17-22]. Currently, the majority of Servers have the ability to tend bar. [Trans. 42/24-43/2].

On the other hand, until June 29, 2008, Bartenders and Bar Captains did exist as classifications in the resort catering operations, and were assigned responsibilities periodically by GSMs. [Trans. 26/21-24]. Servers, Banquet Captains, Bartenders and Bar Captains have all been represented by Local 1625, regardless of whether they have worked in the resort environment or the theme park environment. [Trans. 24/5-15, 25/9-26/24]. There are no written job descriptions in the CBA or elsewhere for the Banquet Captain, Bar Captain, and Bartender roles. [Resp. Exh. 4].

Prior to June 29, 2008, as a general guideline, functions which exceeded 100 guests, or which were especially complicated or demanding, would be staffed with one or more of the Banquet Captains, Bartenders and / or Bar Captains, depending upon the nature and demands of the function, and within the discretion of the GSM. [Trans. 620/18-621/13]. Both Local 1625 and Disney recognized management's discretion to staff functions as it deemed appropriate, as evidenced by the revised language in the "Staffing Guidelines" section of the current CBA. [Resp. Exh. 4]. Indeed, functions with as many as 300 guests may have been staffed without Captains. [Trans. 335/13-25].

For many years prior to June 29, 2008, bargaining unit members statused as full-time Banquet Captains, Bar Captains and Bartenders would also work as Banquet Servers, and would be assigned / selected to functions in that capacity based upon their bargaining unit seniority.

[Trans. 61/21-62/9, 113/11-15]. When they were assigned work as Servers, they would participate in the Server gratuity pool, but would still be paid their higher hourly rates as Bar Captains, Banquet Captains and Bartenders. [Trans. 558/21-25]. On those occasions when they would be selected to work functions as Bar Captains, Banquet Captains or Bartenders, they would be paid at their higher hourly rates, and would receive pro rata shares from a separate gratuity pool consisting of an additional .5% payout, in addition to sharing in the 13.5% Server pool. [Trans. 52/17-53/6, 61/13-16]. Thus, bargaining unit Servers were more highly compensated when they worked a function with no Captains, because all of the individuals working the function would be Servers, and would share from the same 14% out of the gratuity pool.[4] [Trans. 115/14-21].

## C. Overlap Of Duties

As Local 1625 member and former Banquet Captain Patrick Mullen testified, for many years prior to June 29, 2008, when GSMs selected Bar Captains and Banquet Captains to staff certain functions, there was a substantial overlap in the duties and responsibilities performed by those classifications and those performed by GSMs. [GC Exh. 12; Trans. 245/22-246/5]. In fact, during this lengthy period of time, there was an overlap of non-management duties and responsibilities of nearly 70% between the duties and responsibilities performed by Bar Captains and Banquet Captains on the one hand, and GSMs on the other. [*Id.*].

Moreover, during this period of time, in addition to overlapping the non-management duties and responsibilities of the Captains, GSMs also had exclusive responsibility for performing the management responsibilities of department representation (global initiatives), facility management, scheduling approvals/changes, performance management (discipline)

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[4] In the resort area, this arrangement affected Bartenders, Beverage Captains and Banquet Captains, while in the theme park catering operations, this affected only Banquet Captains, because the other two classifications did not exist in those locations. [Trans. 44/17-19].

counseling, and setting and monitoring standard and Company policy compliance. [GC Exh. 12].

As Ann Williams testified, the overlap of duties, in addition to being inefficient, was also reflective of the Captains' lack of ability to hold any employees accountable for their actions. [Trans. 118/12-20]. Because Captains did not have the authority to supervise, the only option available to them to deal with disciplinary issues was to consult with a manager. [*Id.*]. Moreover, Captains would also consult with a manager for such issues as inventory shortages and guest complaints. [Trans. 263/12-20] ("[Captains] would always notify a manager if a problem arose.").

Where GSMs determined, in their discretion, that no Bar Captain or Banquet Captain was necessary to staff the particular function,[5] the GSM would be responsible for performing both the management functions and all of the other functions otherwise shared with Captains. [Trans. 116/16-20, 343/18-344/1]. For those functions in which the GSM decided to utilize Captains in his / her staffing plan, the GSM and the Captains would often perform the identical non-management duties and responsibilities shoulder to shoulder. [Trans. 338/23-339/18].

In short, the GSMs had the authority to do the following: (1) determine whether to assign Banquet Captains, Bar Captains, and / or Bartenders to a function; (2) to perform all duties, including duties that would otherwise be shared between GSMs and Captains, at functions to which the GSMs determined no Banquet Captains, Bar Captains, or Bartenders were necessary; (3) to assign Servers to fulfill a Bartender role, as needed; and (4) at functions to which Banquet

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[5] Uncontroverted testimony established that this occurred in about 70% of the functions. [Trans. 336/12-14, 341/10-15]. While there were testimonial discrepancies regarding the number of guests who would attend functions where no Captains were scheduled, the guideline in the 2004 CBA was that Captains would be assigned for functions of over 100 guests. [Resp. Exh. 3].

Captains, Bar Captains, or Bartenders were assigned, to assign all of their duties and to simultaneously perform them.

Disney has used the above-described system for decades, and, as Local 1625 stipulated at the hearing, at no time has it filed a grievance or an unfair labor practice charge claiming that managers were improperly performing bargaining unit work, or that the performance of these duties and responsibilities by GSMs in any other fashion violated any Collective Bargaining Agreement in effect at the time. [Trans. 347/2-4].

**D. Declining Levels Of Service**

During the summer of 2007, Ann Williams became increasingly concerned that Disney's catering operations were not fulfilling Disney's mission to provide the maximum level of guest service to banquet and catering guests. [Trans. 29/25-30/3]. Williams believed that in an increasingly competitive environment in the greater Orlando area for catering and banquet bookings, significantly higher guest service ratings were the recipe for survival and success. [GC Exh. 15]. Williams also concluded that much of the decline in guest service ratings was attributable to inadequacies in the way catering functions were staffed, and in the way responsibilities were allocated and divided among the GSMs. [*Id.*]. For example, as Williams testified, "[Captains] did not have the authority in their position to coach, to discipline. The only thing that they had available to them was to go and then second-hand share it with a manager person who wasn't on the floor." [Trans. 118/12-15]. Therefore, she developed plans for changing Disney's approach to staffing catering functions. [Trans. 120/4-121/1].

One change Williams decided to test as a pilot program was to divide the GSMs into three groups, each with a more specific and specialized set of responsibilities: Planning Manager, Floor Manager, and Facility Manager. [GC Exh. 15]. This pilot program was

implemented in the summer of 2007 at the Yacht & Beach Club Resort. [*Id.*]. This change in the responsibilities of the GSMs in that location did not affect the wages, hours, working conditions, or responsibilities of any bargaining unit employees. [Trans. 31/23; GC Exh. 15]. Guest surveys at that resort, however, disclosed that the increased managerial presence had a significantly positive effect on service ratings. [GC Exh. 15; Resp. Exh. 8].

**E. Reorganization Of Catering Operations**

In October, 2007, Williams presented her findings to senior company leadership in a document entitled, "Disney Service Basics Proposal," in which she first proposed a reorganization of the catering operations and the elimination of the Captain and Bartender classifications.[6] [Trans. 33/4-6, GC Exh. 15]. The framework that the proposed reorganization sought to change was one in which the following issues existed: (1) duties of Captains and GSMs substantially overlapped, creating inefficiency [Trans. 118/12-20]; (2) Captains had no supervisory authority, thus requiring a consultation with a GSM before disciplinary action and other *bona fide* supervisory action could be taken [*Id.*]; Captains had to consult with GSMs to resolve such issues as inventory shortages and guest complaints. [Trans. 263/12-20]. On the other hand, the success of the pilot program at the Yacht & Beach Club resort demonstrated that an increased managerial presence on the floor was likely to improve the declining guest service ratings.

The proposed new guest services focus envisioned by Ms. Williams and her team built in significantly increased levels of management accountability for improvements in guest service ratings by providing over $2.2 million in incentives to GSMs over the next five years. [*Id.*]. The proposed reorganization was projected to cost Disney approximately $8.2 million to implement. [CP Exh. 1]. Moreover, the Company projected hiring 20 additional GSMs — which are all

[6] In January 2008, Williams presented a revised proposal. [GC Exh. 1].

management positions — while not reducing the bargaining unit by a single person. [Trans. 40/10-13; 617/2-7].

**F. Disney Implements The Reorganization Decision**

On June 29, 2008, and July 6, 2008, Disney implemented a system in which the Banquet Captains, Bar Captains and Bartenders were statused as Servers and also were "red circled" in order to preserve their higher hourly rates. [Trans. 617/12-24.]. In addition, the separate gratuity pool for Captains was eliminated along with the position. [Trans. 53/24-54/2]. Seniority was maintained, and modified only to the extent that the Captains and Bartenders were integrated with the Servers. [Resp. Exh. 27A, 27B].

## III.

## ARGUMENT

**A. The Company Did Not Effect An Unlawful Midterm Modification Of The CBA**

To establish that an employer has violated Section 8(d) of the Act, a higher threshold must be met by the General Counsel than that required to establish that an employer has violated Section 8(a)(5).[7] As the Board has pointed out, "a contract modification violation does not exist if there is a good faith reliance on a sound and arguable interpretation of the contract." *Bath Iron Works Corp.,* 345 NLRB No. 33, 178 LRRM 1183, 1187 (2005), *aff'd sub nom Bath Marine Draftsmen's Assoc.*, 475 F.3d 14 (1st Cir. 2007); *see also Phelps Dodge Magnet Wire Corp.*, 346 NLRB No. 84, 179 LRRM 1342, 1345 (2006) (Board holding that employer did not violate Section 8(d), and finding that, "although the [employer]'s construction of [the relevant contract provision] may have been erroneous, its interpretation had a sound and arguable basis.").

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[7] Section III(A) of this Brief addresses Cross-Exceptions 1, 2, and 3 filed by the General Counsel. Section III(B) addresses Cross-Exception 4 filed by the General Counsel. Section III(C) addresses Cross-Exception 5 filed by the General Counsel. Section III(D) addresses Cross-Exception 6 filed by the General Counsel.

Because, as described below, the CBA, relevant bargaining history, and past practice provided Disney with a sound and arguable basis to implement the reorganization plan, Disney did not effect an unlawful mid-term modification of the CBA.

### 1. Contract Language Provided Disney With A Sound And Arguable Basis To Implement The Reorganization Plan

Addendum B-5 of the 2007-2010 CBA refers to the matrix of staffing guidelines for Bartenders, and states that "[t]he parties recognize that the numbers represent a guideline and may fluctuate from event to event." Moreover, Addendum B-5 also states that "Management reserves the right to staff functions as it deems appropriate." The specific grant of authority to Disney in Addendum B-5 to make staffing decisions unilaterally is reinforced by complementary language in the Management Rights clause of the CBA (Article 5, Section 1). This section states, in pertinent part, that Disney has the right to "select and direct the number of employees assigned to any particular classification of work[.]"

The right to select and direct the number of employees assigned to any particular classification includes the right to move some, many, or even all employees from one classification to another, even if the result is that one or more classifications have no assigned employees. [Trans. 475/14-24]. And the right to eliminate a classification is the necessary and inevitable corollary of the right to remove all employees from that classification. *See Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255 (6th Cir. 1995).

Here, the CBA's Management Rights clause allows the Company—without consultation with Local 1625—"to select and direct the number of employees assigned to any particular classification of work[.]" This language is clear and unambiguous in granting Disney the right to select the number of employees—including zero—assigned to any classification of work. This right is also bolstered by the "Staffing Guidelines" section of Addendum B-5, which grants

Disney the exclusive right to staff functions as it deems appropriate. Finally, the Management Rights clause also provides Disney with the authority to "establish and change work schedules and assignments[.]" This language entitled Disney to change Captains' and Bartenders' work schedules, and to assign them to perform as Servers, as had been done routinely under this and predecessor CBA's. Accordingly, Disney had the right under the CBA to choose to no longer assign employees to the Bartender, Banquet Captain, and Bar Captain classifications.

Thus, the above provisions, when read together, provided the Company with a sound and arguable basis to believe that the CBA permitted the elimination of the Captain, Bartender, and Bartender Captain classifications and the attendant reorganization of the catering operations.[8]

### 2. Bargaining History Provided Disney With A Sound And Arguable Basis To Implement The Reorganization Plan

As a result of the negotiations discussed in Part II(A), *supra*, in the current CBA the Addendum B-5 subsection entitled "Catering" contains a subsection entitled "Staffing Guidelines" that unequivocally articulates Disney's discretionary power to staff functions. The very first line of the "Staffing Guidelines" states, "Management reserves the right to staff functions as it deems appropriate." Just below this language is a matrix that includes only Bartenders, and duplicates the staffing ratios listed in the Bartender section of the 2004 CBA's staffing matrix.

While it might appear that the retention of the matrix section for Bartenders was an indication that the GSMs had less discretion with to determine staffing for Bartenders, this was in fact not the case. Uncontroverted testimony from John Stafford, Catering Operations Director,

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[8] The language in Addendum D-5 in the 2004-2007 CBA, while not as strong, also reflected a collectively bargained agreement to vest in Disney the right to exercise sole and unreviewable discretion over staffing decisions. The addition of the asterisked phrase in the 2007-2010 Addendum B-5, which significantly bolstered management's discretion to make staffing decisions, together with the deletion from Addendum B-5 of the "Staffing Guidelines" for all Captains, further demonstrates the reasonableness of the Company's interpretation of the 2007-2010 CBA.

and Jerry Vincent, both of whom represented the Company at the bargaining table, established that GSMs had complete discretion to staff Bartenders as the GSMs deemed appropriate. [Trans. 464/21-465/8, 351/10-15].

In light of the discretionary authority language in Addendum B-5 of the 2007 CBA, which substantially bolstered the comparable phrase from Addendum D-5 of the 2004 CBA, and the fact that the subsection is entitled, "**Staffing Guidelines**," it is clear that the addition of the new language provided Disney with significant discretion to implement the staffing changes included as part of the reorganization. At the very least, the bargaining history provided Disney with a sound and arguable basis to implement the reorganization.

### 3. Past Practice Provided Disney With A Sound And Arguable Basis To Implement The Reorganization Plan

The Union's consistent past practice of (1) permitting management exercise of unfettered discretion in making staffing decisions under Addendum B-5, and (2) acquiescing to the performance by GSMs of non-supervisory "bargaining unit" duties during catered functions, whether or not Captains were working the functions, provided the Company with a sound an arguable basis to believe that the reorganization was permissible under the CBA.

Here, Local 1625 consistently acquiesced to Disney's practice over decades of GSMs performing the following actions: (1) determining whether, if at all, to staff Banquet Captains, Bar Captains, and Bartenders at Company functions; (2) when deciding to staff Banquet Captains, Bar Captains, and / or Bartenders at a function, determining how many of each type of employee to utilize at each function; (3) determining the scope of their duties, and performing many such duties shoulder-to-shoulder with the bargaining unit Captains; (4) performing all of the bargaining unit Captains' responsibilities if the GSM decides not to staff Captains at a

function; and (5) staffing and assigning Banquet Captains, Bar Captains, and Bartenders as Servers, at the GSMs discretion.[9]

Both General Counsel and Disney witnesses testified that GSMs had sole discretion to determine whether or not Captains would be utilized on functions. [Trans. 173/3-18, 114/24-115/2]. Julee Jerkovich conceded that functions of 50 or more guests may not utilize Captains, while John Stafford testified that functions with 300 guests may not utilize Captains. [Trans. 335/13-25, 174/18-21]. Moreover, because the "guidelines" which appeared in the 2004 Addendum D-5, and the 2007 Addendum B-5 suggested using Captains on functions serving 100 or more guests, clearly GSMs had the authority to exercise discretion over the decision as to when to use Captains. There is no dispute, however, as to the testimony that 70% of the functions staged at Disney resorts and parks did not utilize Captains. [Trans. 336/12-22].

John Stafford testified without contradiction that there was substantial overlap and duplication in the performance of non-supervisory "bargaining unit work" by GSMs, shoulder to shoulder with Captains. [Trans. 336/12-339/18]. General Counsel Exhibit 12 identifies 19 separate non-supervisory, "bargaining unit tasks" performed by Captains that were also performed by GSMs when they worked the same functions. [GC Exh. 12]. Even more significant, when GSMs decided not to use Captains at all in staffing functions, which occurred in 70% of the functions, GSMs were solely responsible for performing these 19 "bargaining unit" tasks. [Trans. 343/18-344/1]. Nonetheless, again, during the decades over which this system has been utilized at Walt Disney World, not a single grievance has been filed that claimed that supervisors were violating a collective bargaining agreement by performing "bargaining unit work." [Trans. 347/2-4].

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[9] *See* Sections II(B) through II(E), *supra.*

Accordingly, past practice certainly provided Disney with a sound and arguable basis to reorganize its classifications, especially where the affected employees would be paid their existing base rates. [Trans. 617/12-16].

## B. The Company Was Permitted To Unilaterally Eliminate the Captain, Bartender Captain, and Bartender Classifications With Or Without Bargaining To Impasse

The Company was permitted to unilaterally implement the reorganization commencing June 29, 2008, without bargaining to impasse with the Union over the decision to reorganize. For reasons described in Disney's Post-Hearing Brief and Disney's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Disney was permitted to implement the reorganization unilaterally because it was a major entrepreneurial change not subject to bargaining under *First National Maintenance Corp.*[10] and its progeny. Additionally, the Company was permitted to implement the reorganization unilaterally because the Union clearly and unmistakably waived the right to bargain about it.

Implicit in these arguments is the recognition that, but for the operation of the *First National Maintenance* doctrine and the Union's waiver, the reorganization decision—which resulted in the reclassification of bargaining unit employees and the attendant alteration of their duties, vacation scheduling, and compensation structure—would have been a mandatory subject of bargaining because it would effect an alteration of the terms and conditions of employment. *See Antelope Valley Press*, 311 NLRB 459, 460 (1993) (noting that a decision that alters the terms and conditions of employment is a mandatory subject of bargaining). The ALJ's Decision considered Disney's reorganization decision to involve a modification to the terms and conditions of employment that could not be instituted without bargaining to impasse. [Decision: 7/28-33; 14/51-15/4]. While the Company does not agree with the ALJ's failure to find (a) that

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[10] 452 U.S. 666 (1981).

the reorganization decision was exempt from decision-bargaining under *First National Maintenance Corp.* and its progeny, and (b) that the Union waived the right to bargain about the reorganization decision, the ALJ nevertheless was correct that the decision did affect the terms and conditions of employment, which are mandatory subjects of bargaining. *See Antelope Valley Press*, 311 NLRB at 460. To the extent that the General Counsel contends that the reorganization decision was a permissive subject of bargaining, its argument is without merit.[11]

The General Counsel has belatedly sought to argue that the reorganization implemented by Disney was a permissive subject of bargaining. [GCB: 8-10]. The General Counsel, however, is speaking out of both sides of his mouth on this issue, given that the Complaint, as amended, alleges that the reorganization was a mandatory subject of bargaining about which the Company failed to bargain with the Union. [Cmplt. ¶¶ 6, 7(d), 10].[12] Under the circumstances, the General Counsel, as his evidence and approach to this litigation illustrate, has conceded that the subject matter of the reorganization, assuming it was not exempt from bargaining under *First National Maintenance Corp.*, was a mandatory subject of bargaining that could be waived by the Union under well established Board law.

Given this abrupt shift in legal theory, and given that the two theories are factually and legally inconsistent, it appears that the Board is no longer taking the position that the company violated Sections 8(a)(5) and (1) of the Act by failing to decision bargain about a mandatory subject of bargaining, and instead is hinging its prosecution on the theory that the Company unilaterally made a change to a permissive subject of bargaining, i.e., the scope of the bargaining unit.

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[11] Obviously, the same Company decision cannot be both a mandatory and a permissive bargaining subject.

[12] The Complaint is abbreviated as follows: [Cmplt.: 1] refers to page 1 of the Complaint. The First Amendment to Complaint is abbreviated as follows: [Am. Cmplt.: 1] refers to page 1 of the Amendment to Complaint.

Nevertheless, the General Counsel is flat wrong about its theory that the Company unilaterally changed the scope of the bargaining unit. Board law is clear that the scope of a bargaining unit is not altered if its size and membership remain the same. *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993). Moreover, Board precedent makes clear that unilateral changes that affect what employees do, rather than who the union represents, are considered to be changes of terms and conditions of employment that are mandatory subjects of bargaining, rather than an alteration of the scope of the unit that is a permissive subject of bargaining. *Storer Communications, Inc.*, 295 NLRB 72 (1989), *enforced sub nom. Stage Employees IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990); *see also Antelope Valley Press*, 311 NLRB at 460.

Finally, the cases cited by the General Counsel that state that removal or modification of a bargaining unit position without consent is prohibited by Section 8(a)(1) and (5) of the Act do not involve situations, such as the instant case, in which the employer institutes a major entrepreneurial change that is otherwise exempt from collective bargaining. [GCB: 6-10]. An employer need not obtain union consent to implement such a change. *See, e.g., Furniture Rentors v. NLRB*, 36 F. 3d 1240 (3rd Cir. 1994); *First Nat'l Maint. Corp.*, 452 U.S. 666 (1981).

### C. The ALJ Did Not Err By Failing To Include In The Notice A Requirement That Disney Adhere To The Terms And Conditions Of Employment

Disney maintains its position that the ALJ erred in his findings that it violated the Act, and has already filed Exceptions regarding the Notice to Employees contained in the ALJ's decision. Nevertheless, to the extent that the Notice did not specifically order the Company to adhere to the terms and conditions of employment as set forth in the CBA, the Notice was not in error because, as Disney has argued elsewhere, the Act permitted it to implement the reorganization unilaterally.

The General Counsel's exception to this portion of the notice is puzzling because it contradicts the General Counsel's argument that Disney impermissibly altered the scope of the bargaining unit without the Union's consent. [GCB: 6-10]. By arguing that Disney unlawfully failed to adhere to the terms and conditions of employment in unilaterally implementing the reorganization, the General Counsel concedes that this case is, from its perspective, about unilateral changes to mandatory subjects of bargaining—namely, the terms and conditions of employment. Yet the General Counsel specifically amended the Complaint in this case to remove the allegation that Disney's "assignment of Unit work to persons outside the Unit is a mandatory subject of bargaining." [Cmplt.: 4; Am. Cmplt.: 1].

Because the Act permitted Disney to implement the reorganization unilaterally, and without decision bargaining, the Notice was not in error to the extent that it did not specifically order Disney to adhere to the terms and conditions of employment set forth in the CBA.

## D. Simple Interest Is The Appropriate Method For Calculation Of Back Pay And Other Monetary Remedies

The Company expressly denies that it violated the Act. Nevertheless, contrary to the General Counsel's assertion, the correct formula for calculating a damages award is the simple interest formula cited by the ALJ. [GCB:10].

The Board consistently applies a simple interest formula to back pay and other monetary awards. *See, e.g., New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987); *Nat'l Fabco Mfg.*, 352 NLRB No. 37 (2008). The General Counsel's Brief fails to cite a Board decision in which a simple interest formula has not been applied, and the Respondent is not aware of any such decision. Instead, the General Counsel argues that the Board should exercise its remedial discretion, adopt a compound interest formula, and apply it to this case. [GCB: 11-21].

The General Counsel's primary argument in favor of compound interest is that it makes employees affected by an employer's unlawful acts "fully whole" for their losses. [GCB: 11]. In support of this argument, the General Counsel notes that reversal of the Board's policy will place its remedies in line with the established practice of banks and other financial institutions, from which employees who are affected by an employer's unlawful acts will be forced to obtain loans. [*Id.*]. In other words, the General Counsel argues that because affected employees will be forced to take out loans to make up for lost income, which loans must be repaid with compounded interest,[13] an award of only simple interest would be inadequate to make the employees fully whole. [*Id.*].

Assuming, *arguendo*, that the Board considers reversing its long-standing policy of applying a simple interest formula, the instant case likely would make the Board think twice about such a reversal. Neither the General Counsel nor the Union presented any record evidence that the reorganization caused any affected employees to seek loans to make ends meet—indeed, this would be an unlikely scenario in light of the Company's maintenance of the existing base pay for the reclassified employees. Yet the General Counsel repeatedly argues that compound interest makes employees whole because it accounts for the "market realities" of employees having to borrow money from financial institutions in order to make ends meet. [GCB: 12, 21]. In light of the General Counsel's failure to present any evidence that such "market realities" actually apply to the reclassified Captains, Bar Captains, and Bartenders, the General Counsel's argument in favor of compound interest rings hollow. The compound interest argument is further weakened by the fact that none of the former Captains, Bar Captains, or Bartenders lost their jobs as a result of the reorganization.

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[13] This argument is infused with rank speculation and is devoid of support in the record.

Moreover, the General Counsel's Brief frequently cites to cases involving "discriminatees" in its argument that compound interest is the appropriate means of calculating back pay and other monetary remedies. [GCB: 11, 15, 17]. Yet the Complaint, as amended, does not allege a violation of section 8(a)(3) of the Act. Accordingly, awards that have been issued on the basis of complainants' status as "discriminatees" should not be considered to determine the appropriate award in non-discrimination cases.

## IV.

## CONCLUSION

For all of the foregoing reasons, the General Counsel's Cross-Exceptions are without merit, and Disney respectfully requests that the Board deny them in their entirety. Disney further respectfully requests that the Board reverse the Decision of the Administrative Law Judge and dismiss the Complaint in its entirety.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on the 9th day of September, 2009, a true and correct copy of the foregoing has been furnished by electronic mail to:

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